



98TH GENERAL ASSEMBLY

State of Illinois

2013 and 2014

SB2984

Introduced 2/4/2014, by Sen. Kirk W. Dillard

SYNOPSIS AS INTRODUCED:

760 ILCS 5/16.4

Amends the Trusts and Trustees Act. In the Section concerning conditions and requirements for the distribution of trust principal to a second trust, changes definitions. Changes references to "trustee" to references to "authorized trustee". Relocates a provision that an authorized trustee's actions may not be deemed improper or inconsistent with the authorized trustee's duty of impartiality unless the court finds from all the evidence that the authorized trustee acted in bad faith. Makes technical and substantive changes in subsections concerning: purpose; distribution to the second trust; notice; court involvement; term of the second trust; divided discretion; distribution in future trust; authority to distribute; restrictions upon an authorized trustee; tax limitations; the written instrument; remedies; and application of the Section. Repeals a subsection concerning an exception to certain restrictions upon an authorized trustee. Relocates and makes technical and substantive changes to provisions concerning limits on the compensation of an authorized trustee.

LRB098 12960 HEP 49929 b

1 AN ACT concerning civil law.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 5. The Trusts and Trustees Act is amended by
5 changing Section 16.4 as follows:

6 (760 ILCS 5/16.4)

7 Sec. 16.4. Distribution of trust principal in further
8 trust.

9 (a) Definitions. In this Section:

10 "Absolute discretion" means the right to distribute
11 principal that is not limited or modified in any manner to or
12 for the benefit of one or more beneficiaries of the trust,
13 whether or not the term "absolute" is used. A power to
14 distribute principal that includes purposes such as best
15 interests, welfare, or happiness shall constitute absolute
16 discretion, regardless of any requirement to take into account
17 other resources of the beneficiaries.

18 "Authorized trustee" means a fiduciary ~~an entity or~~
19 ~~individual~~, other than the settlor, who has authority under the
20 terms of the first trust to distribute the principal of the
21 trust to ~~for the benefit of~~ one or more current beneficiaries
22 other than by exercise of a power of appointment held in a
23 nonfiduciary capacity.

1 "Code" means the United States Internal Revenue Code of
2 1986, as amended from time to time, including corresponding
3 provisions of subsequent internal revenue laws and
4 corresponding provisions of State law.

5 "Current beneficiary" means a person who is currently
6 receiving or eligible to receive a distribution of principal or
7 income from the trustee on the date of the determination
8 ~~exercise of the power~~.

9 "Distribute" means the power to pay directly to the
10 beneficiary of a trust or make application for the benefit of
11 the beneficiary.

12 "First trust" means an existing irrevocable inter vivos or
13 testamentary trust part or all of the principal of which is or
14 will be distributed in further trust under subsection (c) or
15 (d).

16 "Presumptive remainder beneficiary" means a beneficiary of
17 a trust, as of the date of determination and assuming
18 non-exercise of all powers of appointment, who either (i) would
19 be eligible to receive a distribution of income or principal if
20 the trust terminated on that date, or (ii) would be eligible to
21 receive a distribution of income or principal if the interests
22 of all beneficiaries currently eligible to receive income or
23 principal from the trust ended on that date without causing the
24 trust to terminate.

25 "Principal" includes the income of the trust at the time of
26 the exercise of the power that is not currently required to be

1 distributed, including accrued and accumulated income.

2 "Second trust" means any irrevocable trust to which
3 principal is or will be distributed in accordance with
4 subsection (c) or (d).

5 "Successor beneficiary" means any beneficiary other than
6 the current and presumptive remainder beneficiaries, including
7 a person who may become a beneficiary in the future by reason
8 of inclusion in a class, but does not include a potential
9 appointee of a power of appointment held by a beneficiary if
10 the appointee is not otherwise a beneficiary.

11 (b) Purpose. An authorized ~~independent~~ trustee who has
12 discretion to distribute principal, including any distribution
13 under subsection (c) or (d) of this Section, to one or more ~~to~~
14 ~~make distributions to the~~ beneficiaries shall exercise that
15 discretion in the trustee's fiduciary capacity, whether the
16 trustee's discretion is absolute or not, to further ~~limited to~~
17 ~~ascertainable standards, in furtherance of~~ the purposes of the
18 trust. An authorized trustee's actions in accordance with this
19 Section may not be deemed improper or inconsistent with the
20 authorized trustee's duty of impartiality unless the court
21 finds from all the evidence that the authorized trustee acted
22 in bad faith.

23 (c) Distribution to second trust if absolute discretion. An
24 authorized trustee who has the absolute discretion to
25 distribute the principal of a trust to one or more of the
26 current beneficiaries may distribute part or all of the

1 principal of the first trust in favor of a trustee of a second
2 trust, provided that the current beneficiaries of the second
3 trust include only one or more ~~for the benefit of one, more~~
4 ~~than one, or all~~ of the current beneficiaries of the first
5 trust and the presumptive remainder beneficiaries and
6 successor beneficiaries of the second trust include only one or
7 more ~~for the benefit of one, more than one, or all~~ of the
8 current beneficiaries, presumptive successor ~~and~~ remainder
9 beneficiaries, and successor beneficiaries of the first trust.

10 (1) If the authorized trustee exercises the power under
11 this subsection, the second trust may, but need not, grant
12 to a beneficiary the same power of appointment that was
13 granted to such beneficiary under the first trust.

14 (2) If the authorized trustee exercises the power under
15 this subsection, the second trust may grant a power of
16 appointment (including a presently exercisable power of
17 appointment) ~~in the second trust~~ to one or more of the
18 current beneficiaries of the first trust to whom the
19 trustee has the absolute discretion to distribute
20 principal, and ~~, provided that the beneficiary granted a~~
21 ~~power to appoint could receive the principal outright under~~
22 ~~the terms of the first trust. (2) If the authorized trustee~~
23 ~~grants a power of appointment,~~ the class of permissible
24 appointees in favor of whom the ~~a~~ beneficiary may exercise
25 the power of appointment ~~granted in the second trust~~ may be
26 broader than or otherwise different from the current,

1 ~~successor, and~~ presumptive remainder and successor
2 beneficiaries of the first trust. ~~beneficiaries of the~~
3 ~~first trust.~~

4 (3) (Blank). ~~If the beneficiary or beneficiaries of the~~
5 ~~first trust are described as a class of persons, the~~
6 ~~beneficiary or beneficiaries of the second trust may~~
7 ~~include one or more persons of such class who become~~
8 ~~includible in the class after the distribution to the~~
9 ~~second trust.~~

10 (d) Distribution to second trust if no absolute discretion.

11 (1) An authorized trustee who has the power to
12 distribute the principal of a trust but does not have the
13 absolute discretion to distribute the principal of the
14 trust may distribute part or all of the principal of the
15 first trust in favor of a trustee of a second trust,
16 provided that the interests of each beneficiary of the
17 second trust are substantially similar to the interests of
18 the beneficiary in the first trust. For purposes of this
19 subsection, a power to make distributions for the benefit
20 of a beneficiary shall be considered materially the same as
21 a power to make distributions to that beneficiary. ~~current~~
22 ~~beneficiaries of the second trust shall be the same as the~~
23 ~~current beneficiaries of the first trust and the successor~~
24 ~~and remainder beneficiaries of the second trust shall be~~
25 ~~the same as the successor and remainder beneficiaries of~~
26 ~~the first trust.~~

1 ~~(1) If the authorized trustee exercises the power under~~
2 ~~this subsection (d), the second trust shall include the~~
3 ~~same language authorizing the trustee to distribute the~~
4 ~~income or principal of a trust as set forth in the first~~
5 ~~trust.~~

6 ~~(2) If the beneficiary or beneficiaries of the first~~
7 ~~trust are described as a class of persons, the beneficiary~~
8 ~~or beneficiaries of the second trust shall include all~~
9 ~~persons who become includible in the class after the~~
10 ~~distribution to the second trust.~~

11 ~~(3) If the authorized trustee exercises the power under~~
12 ~~this subsection (d) and if the first trust grants a power~~
13 ~~of appointment to a beneficiary of the trust, the second~~
14 ~~trust shall grant such power of appointment in the second~~
15 ~~trust and the class of permissible appointees shall be the~~
16 ~~same as in the first trust.~~

17 (2) ~~(4)~~ Supplemental Needs Trusts.

18 (i) Notwithstanding paragraph (1) of this ~~the~~
19 ~~other provisions of this~~ subsection (d), the
20 authorized trustee may distribute part or all of the
21 principal of a disabled beneficiary's interest in the
22 first trust in favor of a trustee of a second trust
23 which is a supplemental needs trust if the authorized
24 trustee determines that to do so would be in the best
25 interests of the disabled beneficiary.

26 (ii) Definitions. For purposes of this subsection

1 (d):

2 "Best interests" of a disabled beneficiary
3 include, without limitation, consideration of the
4 financial impact to the disabled beneficiary's
5 family.

6 "Disabled beneficiary" means a current
7 beneficiary, presumptive remainder beneficiary, or
8 successor beneficiary of the first trust who the
9 authorized trustee determines has a disability
10 that substantially impairs the beneficiary's
11 ability to provide for his or her own care or
12 custody and that constitutes a substantial
13 handicap, whether or not the beneficiary has been
14 adjudicated a "disabled person".

15 "Governmental benefits" means financial aid or
16 services from any State, Federal, or other public
17 agency.

18 "Supplemental needs second trust" means a
19 trust that complies with subparagraph ~~paragraph~~
20 (iii) of this paragraph (2) ~~(4)~~ and that relative
21 to the first trust contains either lesser or
22 greater restrictions on the trustee's power to
23 distribute trust income or principal and which the
24 trustee believes would, ~~if implemented,~~ allow the
25 disabled beneficiary to receive a greater degree
26 of governmental benefits than the disabled

1 beneficiary will receive if no distribution is
2 made.

3 (iii) Remainder beneficiaries. A supplemental
4 needs second trust may name presumptive remainder and
5 successor beneficiaries other than the disabled
6 beneficiary's estate, provided that the second trust
7 names the same presumptive remainder beneficiaries and
8 successor beneficiaries to the disabled beneficiary's
9 interest, and in the same proportions, as exist in the
10 first trust. In addition to the foregoing, where the
11 first trust was created by the disabled beneficiary or
12 the trust property has been distributed directly to or
13 is otherwise under the control of the disabled
14 beneficiary, the authorized trustee may distribute to
15 a "pooled trust" as defined by federal Medicaid law for
16 the benefit of the disabled beneficiary or the
17 supplemental needs second trust must contain pay back
18 provisions complying with Medicaid reimbursement
19 requirements of federal law.

20 (iv) Reimbursement. A supplemental needs second
21 trust shall not be liable to pay or reimburse the State
22 or any public agency for financial aid or services to
23 the disabled beneficiary except as provided in the
24 supplemental needs second trust.

25 (e) Notice. An authorized trustee may exercise the power to
26 distribute in favor of a second trust under subsection

1 ~~subsections (c) or and (d) without the consent of any person~~
2 ~~the settlor or the beneficiaries of the first trust and without~~
3 ~~court approval, provided that an if: (1) there are one or more~~
4 ~~legally competent current beneficiaries and one or more legally~~
5 ~~competent presumptive remainder beneficiaries and the~~
6 authorized trustee shall provide ~~sends~~ written notice of the
7 intended exercise of the power under subsection (c) or (d),
8 ~~trustee's decision,~~ specifying the manner in which the trustee
9 intends to exercise the power and the prospective effective
10 date for the distribution not later than 60 days prior to the
11 exercise (the "notice period") to:; to all of the

12 (i) the settlor of the first trust, if living and
13 legally competent;

14 (ii) all legally competent current beneficiaries
15 and all legally competent presumptive remainder
16 beneficiaries of the first trust, determined as of the
17 date ~~the~~ notice is sent; ~~and assuming non exercise of~~
18 ~~all powers of appointment; and~~

19 ~~(2) no beneficiary to whom notice was sent objects to~~
20 ~~the distribution in writing delivered to the trustee within~~
21 ~~60 days after the notice is sent ("notice period").~~

22 (iii) any person who currently has the right to
23 remove or replace the authorized trustee; and

24 (iv) all trustees of the first trust who are not
25 authorized trustees.

26 The distribution may be made prior to the expiration of the

1 notice period if all persons receiving notice waive the notice
2 period. An authorized ~~A~~ trustee is not required to provide ~~a~~
3 ~~copy of the~~ notice to a person ~~beneficiary~~ who is known to the
4 authorized trustee but who cannot be located by the authorized
5 trustee after reasonable diligence or who is not known to the
6 authorized trustee. If a charity is a current beneficiary or
7 presumptive remainder beneficiary of the trust, ~~the~~ notice
8 shall also be given to the Attorney General's Charitable Trust
9 Bureau. The authorized trustee's giving of notice of an
10 intended exercise of the power under subsection (c) or (d) or
11 the waiver or expiration of the notice period does not limit
12 the right of the notice recipient to object to the exercise of
13 the power under to subsection (u).

14 (f) Court involvement. ~~(1)~~ The authorized trustee may for
15 any reason elect to petition the court to order a ~~the~~
16 distribution under subsection (c) or (d). In a judicial
17 proceeding under this subsection (f), the authorized trustee
18 has the burden of proving the proposed exercise of the power
19 furtheres the purposes of the trust., ~~including, without~~
20 ~~limitation, the reason that the trustee's exercise of the power~~
21 ~~to distribute under this Section is unavailable, such as:~~

22 ~~(a) a beneficiary timely objects to the~~
23 ~~distribution in a writing delivered to the trustee~~
24 ~~within the time period specified in the notice; or~~

25 ~~(b) there are no legally competent current~~
26 ~~beneficiaries or legally competent presumptive~~

1 ~~remainder beneficiaries.~~

2 ~~(2) If the trustee receives a written objection within~~
3 ~~the notice period, either the trustee or the beneficiary~~
4 ~~may petition the court to approve, modify, or deny the~~
5 ~~exercise of the trustee's powers. The trustee has the~~
6 ~~burden of proving the proposed exercise of the power~~
7 ~~furtheres the purposes of the trust.~~

8 ~~(3) In a judicial proceeding under this subsection (f),~~
9 ~~the trustee may, but need not, present the trustee's~~
10 ~~opinions and reasons for supporting or opposing the~~
11 ~~proposed distribution, including whether the trustee~~
12 ~~believes it would enable the trustee to better carry out~~
13 ~~the purposes of the trust. A trustee's actions in~~
14 ~~accordance with this Section shall not be deemed improper~~
15 ~~or inconsistent with the trustee's duty of impartiality~~
16 ~~unless the court finds from all the evidence that the~~
17 ~~trustee acted in bad faith.~~

18 (g) Term of the second trust. The second trust to which an
19 authorized trustee distributes the assets of the first trust
20 may have a term that is longer than the term set forth in the
21 first trust, including, but not limited to, a term measured by
22 the lifetime of a current beneficiary; provided, however, that
23 the second trust shall be limited to the same permissible
24 period of the rule against perpetuities that applied to the
25 first trust, or a shorter period, unless the first trust
26 expressly permits the trustee to extend or lengthen its

1 perpetuities period.

2 (h) Divided discretion. If an entity or individual
3 ~~authorized trustee~~ has absolute discretion to distribute the
4 principal of a trust and the same entity or individual ~~trustee~~
5 or another entity or individual ~~trustee~~ has the power to
6 distribute principal under the trust instrument that ~~which~~
7 ~~power~~ is not absolute discretion, the entity or individual ~~such~~
8 ~~authorized trustee~~ having absolute discretion may exercise the
9 power to distribute under subsection (c).

10 (i) Later discovered assets. To the extent the authorized
11 trustee does not provide otherwise:

12 (1) The distribution of all of the assets comprising
13 the principal of the first trust in favor of a second trust
14 shall be deemed to include subsequently discovered assets
15 otherwise belonging to the first trust and undistributed
16 principal paid to or acquired by the first trust subsequent
17 to the distribution in favor of the second trust.

18 (2) The distribution of part but not all of the assets
19 comprising the principal of the first trust in favor of a
20 second trust shall not include subsequently discovered
21 assets belonging to the first trust and principal paid to
22 or acquired by the first trust subsequent to the
23 distribution in favor of a second trust; such assets shall
24 remain the assets of the first trust.

25 (j) Other authority to distribute in further trust. This
26 Section shall not be construed to abridge the right of any

1 trustee or other person to distribute property in further trust
2 that arises under the terms of the governing instrument of a
3 trust, any provision of applicable law, or a court order. In
4 addition, distribution of trust principal to a second trust may
5 be made by a nonjudicial settlement agreement ~~between a trustee~~
6 ~~and all primary beneficiaries of a first trust, acting either~~
7 ~~individually or by their respective representatives~~ in
8 accordance with Section 16.1 of this Act.

9 (k) Need to distribute not required. An authorized trustee
10 may exercise the power to distribute in favor of a second trust
11 under subsection ~~subsections~~ (c) or ~~and~~ (d) whether or not
12 there is a current need to distribute principal under the terms
13 of the first trust.

14 (l) No duty to distribute. Nothing in this Section is
15 intended to create or imply a duty to exercise a power to
16 distribute principal, and no inference of impropriety shall be
17 made as a result of an authorized trustee not exercising the
18 power conferred under subsection (c) or (d). Notwithstanding
19 any other provision of this Section, neither an authorized
20 trustee nor any other ~~a~~ trustee has a ~~no~~ duty to inform
21 beneficiaries about the availability of this Section and no
22 duty to review the trust to determine whether any action should
23 be taken under this Section.

24 (m) Express prohibition. A power authorized by subsection
25 (c) or (d) may not be exercised if expressly prohibited by the
26 terms of the governing instrument, but a general prohibition of

1 the amendment or revocation of the first trust or a provision
2 that constitutes a spendthrift clause shall not preclude the
3 exercise of a power under subsection (c) or (d).

4 (n) Restrictions. An authorized trustee may not exercise a
5 power authorized by subsection (c) or (d) to affect any of the
6 following:

7 (1) to reduce, limit or modify any beneficiary's
8 current right to a mandatory distribution of income or
9 principal, a mandatory annuity or unitrust interest, a
10 right to withdraw a percentage of the value of the trust or
11 a right to withdraw a specified dollar amount provided that
12 such mandatory right has come into effect with respect to
13 the beneficiary, except with respect to a second trust
14 which is a supplemental needs trust;

15 (2) to increase, or change the method of determining,
16 the compensation of the authorized trustee unless the
17 increase in, or change in the method of determining, that
18 compensation has been consented to by all of the legally
19 competent current beneficiaries (and there is at least one
20 such beneficiary) and legally competent presumptive
21 remainder beneficiaries (and there is at least one such
22 beneficiary) of the second trust or is approved by the
23 court. However, an increase in compensation of the
24 authorized trustee arising solely because the duration of
25 the second trust is longer than the duration of the first
26 trust is not considered an increase in, or a change in the

1 method of determining, the compensation of the authorized
2 trustee. No authorized trustee or other trustee may receive
3 any commission or other compensation imposed upon assets
4 distributed due to the distribution of property from the
5 first trust to a second trust under subsection (c) or (d);

6 (3) ~~(2)~~ to decrease or indemnify against a trustee's
7 liability or exonerate a trustee from liability for failure
8 to exercise reasonable care, diligence, and prudence;
9 except to indemnify or exonerate one party from liability
10 for actions of another party with respect to distribution
11 that unbundles the governance structure of a trust to
12 divide and separate fiduciary and nonfiduciary
13 responsibilities among several parties, including without
14 limitation one or more trustees, distribution advisors,
15 investment advisors, trust protectors, or other parties,
16 provided however that such modified governance structure
17 may reallocate fiduciary responsibilities from one party
18 to another but may not reduce them; or

19 (4) ~~(3)~~ to modify ~~eliminate~~ a provision granting
20 another person the right to remove or replace the
21 authorized trustee exercising the power under subsection
22 (c) or (d), unless either (i) the ~~provided, however, such~~
23 person currently holding the right consents to the
24 modification or (ii) the court approves the modification
25 and the modification grants the right to another person who
26 is independent of and nonsubservient to the authorized

1 ~~trustee.'s right to remove or replace the authorized~~
2 ~~trustee may be eliminated if a separate independent,~~
3 ~~non-subservient individual or entity, such as a trust~~
4 ~~protector, acting in a nonfiduciary capacity has the right~~
5 ~~to remove or replace the authorized trustee;~~

6 ~~(4) to reduce, limit or modify the perpetuities~~
7 ~~provision specified in the first trust in the second trust,~~
8 ~~unless the first trust expressly permits the trustee to do~~
9 ~~so.~~

10 For purposes of this subsection (n), a beneficiary's
11 current right to a distribution of income is not considered to
12 be mandatory if, under the terms of the first trust, current
13 distributions of principal may be made to any person other than
14 that current beneficiary.

15 (o) (Blank). ~~Exception. Notwithstanding the provisions of~~
16 ~~paragraph (1) of subsection (n) but subject to the other~~
17 ~~limitations in this Section, an authorized trustee may exercise~~
18 ~~a power authorized by subsection (c) or (d) to distribute to a~~
19 ~~second trust; provided, however, that the exercise of such~~
20 ~~power does not subject the second trust to claims of~~
21 ~~reimbursement by any private or governmental body and does not~~
22 ~~at any time interfere with, reduce the amount of, or jeopardize~~
23 ~~an individual's entitlement to government benefits.~~

24 (p) Tax limitations. The exercise of a power authorized by
25 subsection (c) or (d) is subject to the following additional
26 limitations: If any contribution to the first trust qualified

1 ~~for the annual exclusion under Section 2503(b) of the Code, the~~
2 ~~marital deduction under Section 2056(a) or 2523(a) of the Code,~~
3 ~~or the charitable deduction under Section 170(a), 642(c),~~
4 ~~2055(a) or 2522(a) of the Code, is a direct skip qualifying for~~
5 ~~treatment under Section 2642(e) of the Code, or qualified for~~
6 ~~any other specific tax benefit that would be lost by the~~
7 ~~existence of the authorized trustee's authority under~~
8 ~~subsection (c) or (d) for income, gift, estate, or~~
9 ~~generation skipping transfer tax purposes under the Code, then~~
10 ~~the authorized trustee shall not have the power to distribute~~
11 ~~the principal of a trust pursuant to subsection (c) or (d) in a~~
12 ~~manner that would prevent the contribution to the first trust~~
13 ~~from qualifying for or would reduce the exclusion, deduction,~~
14 ~~or other tax benefit that was originally claimed with respect~~
15 ~~to that contribution.~~

16 (1) If any transfer to the first trust qualified, or if
17 not for the provisions of subsection (c) or (d) would have
18 qualified, for a marital or charitable deduction for
19 purposes of any federal income, gift, or estate tax under
20 the Code, or for purposes of any state income, gift,
21 estate, or inheritance tax, the governing instrument for
22 the second trust may not include or omit any term that, if
23 included in or omitted from the trust instrument for the
24 first trust, would have prevented the first trust from
25 qualifying for that deduction, or would have reduced the
26 amount of the deduction, under the same provisions of the

1 Code or under the same provisions of the applicable state
2 law under which the transfer to the first trust so
3 qualified.

4 (2) If any transfer to the first trust has been
5 treated, or if not for the provisions of subsection (c) or
6 (d) would have been treated, as a gift qualifying for the
7 exclusion from the gift tax described in Section 2503(b) of
8 the Code, the governing instrument for the second trust may
9 not include or omit any term that, if included in or
10 omitted from the trust instrument for the first trust,
11 would have prevented any gift to the first trust from so
12 qualifying under the same provisions of Section 2503 of the
13 Code under which the transfer to the first trust so
14 qualified.

15 (3) If the assets of the first trust include any shares
16 of stock in an S corporation, as defined in Section 1361 of
17 the Code, and the first trust is, or if not for the
18 provisions of subsection (c) or (d) would be, a permitted
19 shareholder under any provision of Section 1361 of the
20 Code, an authorized trustee may not exercise a power
21 authorized by subsection (c) or (d) to distribute part or
22 all of the S corporation stock to a second trust that is
23 not a permitted shareholder under Section 1361(c)(2) of the
24 Code. If the assets of the first trust include any shares
25 of stock in an S corporation, as defined in Section 1361 of
26 the Code, and the first trust is, or if not for the

1 provisions of subsection (c) or (d) would be, a qualified
2 Subchapter S trust, an authorized trustee may not exercise
3 a power authorized by subsection (c) or (d) to distribute
4 part or all of the principal of the trust to a second trust
5 whose governing instrument includes or omits any term that
6 prevents the second trust from qualifying as a qualified
7 Subchapter S trust.

8 (4) If any transfer to the first trust has been
9 treated, or if not for the provisions of subsection (c) or
10 (d) would have been treated, as a gift qualifying for a
11 zero inclusion ratio for purposes of the federal
12 generation-skipping transfer tax under Section 2642(c) of
13 the Code, the governing instrument for the second trust may
14 not include or omit any term that, if included in or
15 omitted from the trust instrument for the first trust,
16 would have prevented the transfer to the first trust from
17 so qualifying.

18 (5) If the assets of the first trust include any
19 interest subject to the minimum distribution rules of
20 Section 401(a)(9) of the Code and the Treasury regulations
21 issued under that Section, the governing instrument for the
22 second trust may not include or omit any term that, if
23 included in or omitted from the trust instrument for the
24 first trust, would have shortened the maximum distribution
25 period otherwise allowable under Section 401(a)(9) of the
26 Code and the Treasury regulations with respect to that

1 interest under the first trust.

2 (6) If the trust instrument for the first trust
3 expressly indicates an intention to qualify for any tax
4 benefit or if the terms of the trust instrument for the
5 first trust are clearly designed to enable the first trust
6 to qualify for a tax benefit, and if the first trust did
7 qualify, or if not for the provisions of subsection (c) and
8 (d) would have qualified, for any tax benefit, the
9 governing instrument for the second trust may not include
10 or omit any term that, if included in or omitted from the
11 trust instrument for the first trust, would have prevented
12 the first trust from qualifying for that tax benefit. For
13 purposes of this subdivision (p)(6), "tax benefit" means
14 any federal or state tax deduction, exemption, exclusion,
15 or other tax benefit not otherwise listed in this
16 subsection (p).

17 (7) ~~(1)~~ Notwithstanding the provisions of this
18 subsection (p), but subject to paragraph (3) of this
19 subsection (p), the authorized trustee may exercise the
20 power to distribute the principal of ~~pay~~ the first trust to
21 a second trust as to which the settlor of the first trust
22 is not considered the owner under Subpart E of Part I of
23 Subchapter J of Chapter 1 of Subtitle A of the Code even if
24 the settlor is considered such owner of the first trust.
25 Nothing in this Section shall be construed as preventing
26 the authorized trustee from distributing part or all of the

1 first trust to a second trust that is a trust as to which
2 the settlor of the first trust is considered the owner
3 under Subpart E of Part I of Subchapter J of Chapter 1 of
4 Subtitle A of the Code.

5 ~~(2) During any period when the first trust owns~~
6 ~~subchapter S corporation stock, an authorized trustee may~~
7 ~~not exercise a power authorized by paragraph (c) or (d) to~~
8 ~~distribute part or all of the S corporation stock to a~~
9 ~~second trust that is not a permitted shareholder under~~
10 ~~Section 1361(c)(2) of the Code.~~

11 ~~(3) During any period when the first trust owns an~~
12 ~~interest in property subject to the minimum distribution~~
13 ~~rules of Section 401(a)(9) of the Code, an authorized~~
14 ~~trustee may not exercise a power authorized by subsection~~
15 ~~(c) or (d) to distribute part or all of the interest in~~
16 ~~such property to a second trust that would result in the~~
17 ~~shortening of the minimum distribution period to which the~~
18 ~~property is subject in the first trust.~~

19 (q) (Blank). ~~Limits on compensation of trustee.~~

20 ~~(1) Unless the court upon application of the trustee~~
21 ~~directs otherwise, an authorized trustee may not exercise a~~
22 ~~power authorized by subsection (c) or (d) solely to change~~
23 ~~the provisions regarding the determination of the~~
24 ~~compensation of any trustee; provided, however, an~~
25 ~~authorized trustee may exercise the power authorized in~~
26 ~~subsection (c) or (d) in conjunction with other valid and~~

1 ~~reasonable purposes to bring the trustee's compensation~~
2 ~~into accord with reasonable limits in accord with Illinois~~
3 ~~law in effect at the time of the exercise.~~

4 ~~(2) The compensation payable to the trustee or trustees~~
5 ~~of the first trust may continue to be paid to the trustees~~
6 ~~of the second trust during the terms of the second trust~~
7 ~~and may be determined in the same manner as otherwise would~~
8 ~~have applied in the first trust; provided, however, that no~~
9 ~~trustee shall receive any commission or other compensation~~
10 ~~imposed upon assets distributed due to the distribution of~~
11 ~~property from the first trust to a second trust pursuant to~~
12 ~~subsection (c) or (d).~~

13 (r) Written instrument. The exercise of a power to
14 distribute principal under subsection (c) or (d) must be made
15 by an instrument in writing, signed and acknowledged by the
16 authorized trustee, and filed with the records of the first
17 trust and the second trust.

18 (s) Terms of second trust. Any reference to the governing
19 instrument or terms of the governing instrument in this Act
20 includes the terms of a second trust established in accordance
21 with this Section.

22 (t) Settlor. The settlor of a first trust is considered for
23 all purposes to be the settlor of any second trust established
24 in accordance with this Section. If the settlor of a first
25 trust is not also the settlor of a second trust, then the
26 settlor of the first trust shall be considered the settlor of

1 the second trust, but only with respect to the portion of
2 second trust distributed from the first trust in accordance
3 with this Section.

4 (u) Remedies. An authorized ~~A~~ trustee who reasonably and in
5 good faith takes or omits to take any action under this
6 Section, including petitioning the court under subsection (f),
7 is not liable to any person interested in the trust. An act or
8 omission by an authorized ~~a~~ trustee under this Section is
9 presumed taken or omitted reasonably and in good faith unless
10 it is determined by the court to have been an abuse of
11 discretion. If an authorized ~~a~~ trustee reasonably and in good
12 faith takes or omits to take any action under this Section and
13 a person interested in the trust opposes the act or omission,
14 the person's exclusive remedy is to obtain an order of the
15 court directing the authorized trustee to exercise authority in
16 accordance with this Section in such manner as the court
17 determines necessary or helpful for the proper functioning of
18 the trust, including without limitation prospectively to
19 modify or reverse a prior exercise of such authority. Any claim
20 by any person interested in the trust that an act or omission
21 by an authorized ~~a~~ trustee under this Section was an abuse of
22 discretion is barred if not asserted in a proceeding commenced
23 by or on behalf of the person within 2 years after the
24 authorized trustee has sent to the person or the person's
25 personal representative a notice or report in writing
26 sufficiently disclosing facts fundamental to the claim such

1 that the person knew or reasonably should have known of the
2 claim. Except for a distribution of trust principal from a
3 first trust to a second trust made by agreement in accordance
4 with Section 16.1 of this Act, the preceding sentence shall not
5 apply to a person who was under a legal disability at the time
6 the notice or report was sent and who then had no personal
7 representative. For purposes of this subsection (u), a personal
8 representative refers to a court appointed guardian or
9 conservator of the estate of a person.

10 (v) Application. This Section is available to trusts in
11 existence on January 1, 2013 (the effective date of P.A.
12 97-920) ~~the effective date of this amendatory Act of the 97th~~
13 ~~General Assembly~~ or created on or after January 1, 2013 ~~the~~
14 ~~effective date of this amendatory Act of the 97th General~~
15 ~~Assembly~~. This Section shall be construed as pertaining to the
16 administration of a trust and shall be available to any trust
17 that is administered ~~in Illinois~~ under Illinois law or that is
18 governed by Illinois law with respect to the meaning and effect
19 of its terms, including a trust whose governing law for
20 purposes of administration has been changed to the laws of this
21 State, unless the governing instrument expressly prohibits use
22 of this Section by specific reference to this Section. A
23 provision in the governing instrument in the form: "Neither the
24 provisions of Section 16.4 of the Trusts and Trustees Act nor
25 any corresponding provision of future law may be used in the
26 administration of this trust" or a similar provision

1 demonstrating that intent is sufficient to preclude the use of
2 this Section.

3 (Source: P.A. 97-920, eff. 1-1-13.)